Nos. 15-1125 & 15-1171

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MCKENZIE-WILLAMETTE REGIONAL MEDICAL CENTER ASSOCIATES, LLC, doing business as MCKENZIE-WILLAMETTE MEDICAL CENTER

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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MCKENZIE-WILLAMETTE REGIONAL MEDICAL CENTER ASSOCIATES, LLC, doing business as MCKENZIE-WILLAMETTE MEDICAL CENTER Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner	No. 15-1125 15-1171 Board Case No. 19-CA-119098

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certifies the following:

A. Parties and Amici

McKenzie-Willamette Regional Medical Center Associates, LLC, d/b/a McKenzie-Willamette Medical Center ("the Hospital") is the Petitioner/Cross-Respondent before this Court. The Board is the Respondent/Cross-Petitioner before this Court. Service Employees International Union Local 49, CTW-CLC was the charging party before the Board in unfair-labor practice case No. 19-CA-119098.

B. Ruling under Review

The case under review is a Decision and Order issued by the Board on February 24, 2015, reported at 362 NLRB No. 20, and located at pages 397 to 407 of the Joint Appendix.

C. Related Cases

The ruling under review was not previously before this or any other court, and Board counsel is not aware of any related cases currently pending or about to be presented in this or any other court.

/s/ Linda Dreeben
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Dated at Washington, DC
this 8th day of February 2016

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GLOSSARY

The Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
The Board or NLRB	National Labor Relations Board
Br.	Opening brief of McKenzie-Willamette Regional Medical Center Associates, LLC, d/b/a McKenzie-Willamette Medical Center
Order	*McKenzie-Willamette Regional Medical Center Associates, LLC, d/b/a McKenzie-Willamette Medical Center and Service Employees International Union Local 49, CTW-CLC*, 362 NLRB No. 20 (Feb. 24, 2015)
General Counsel	Counsel for the Board's General Counsel
The Hospital	McKenzie-Willamette Regional Medical Center Associates, LLC, d/b/a McKenzie-Willamette Medical Center
The judge	Administrative Law Judge Dickie Montemayor
The Union	Service Employees International Union Local 49, CTW-CLC

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of McKenzie-Willamette Regional Medical Center Associates, LLC, d/b/a McKenzie-Willamette Medical Center ("the Hospital"), and the cross-application for enforcement of the National Labor Relations Board ("the Board"), of a Decision and Order issued by

the Board on February 24, 2015, and reported at 362 NLRB No. 20. (JA 397-407.)[1] The Board's Decision and Order is final under Section 10(e) and (f) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. § 151 et seq., 160(e) and (f).

This case involves the Hospital's refusal to provide information requested by Service Employees International Union Local 49, CTW-CLC ("the Union") during negotiations over the parties' collective-bargaining agreement. The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). The Hospital's petition for review and the Board's cross-application for enforcement are timely, as the Act places no time limitation on such filings. The Court has jurisdiction over this proceeding under Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) of the Act, which allows the Board, in that circumstance, to cross-apply for enforcement. *Id.* § 160(f), (e).

[1] In this brief, "JA" and "Supp. JA" refer to the Joint Appendix and Supplemental Joint Appendix, respectively. Where applicable, references preceding a semicolon are to the Board's findings, as set forth in the Decision and Order. References following a semicolon are to the supporting evidence. "Br." refers to the Hospital's opening brief.

STATEMENT OF ISSUES

1. The Hospital has waived all arguments regarding the merits of this case by failing to raise them in its opening brief. Accordingly, the only issue related to the merits is: whether the Court should summarily affirm the Board's finding that the Hospital violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by either failing to provide, or unduly delaying the provision of, information requested by the Union and relevant to the Union's fulfillment of its duties as collective-bargaining representative.
2. Agency documents conclusively show that the Board appointed Ronald Hooks as the Regional Director for Region 19 (Seattle) on December 22, 2011, when the Board undisputedly had a valid quorum. The Hospital's attack on Regional Director Hooks's authority to issue the underlying complaint accordingly fails unless it prevails on the subsidiary issues it raises:
   a. whether the Board acted within its discretion in taking administrative notice of the date of Hooks's appointment and denying the Hospital's challenges to evidentiary rulings; and
   b. whether the Board properly rejected the Hospital's claim that the Board is estopped from taking the position that Hooks was appointed on December 22, 2011 because of the Board's inadvertent misstatement in briefing an unrelated case.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

The Board seeks enforcement of its Order finding that the Hospital violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by unreasonably delaying or failing to provide the Union with requested information relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of a unit of the Hospital's employees. The Hospital's opening brief does not offer any defense on the merits of the Board's unfair-labor-practice finding. Instead, the Hospital challenges the authority of the Board's Regional Director to issue the underlying complaint. The Board's findings of fact are summarized below.

I. STATEMENT OF RELEVANT FINDINGS OF FACT

A. Hooks's Appointment as Regional Director of Region 19

In 2000, Ronald K. Hooks was appointed Regional Director of the Board's Region 26, in Memphis, Tennessee. (*See* JA 185 (in announcing his appointment to Region 19, career summary included that "in 2000 [Hooks] was promoted to the Regional Director position in [Memphis]").) On December 22, 2011, the Board appointed Hooks to be Regional Director of Region 19 in Seattle, Washington.

(JA 397, 404; JA 300.) On the same day, the Board also appointed Claude Harrell and Olivia Garcia as Regional Directors of Region 10 (Atlanta) and Region 21 (Los Angeles), respectively. (JA 300.) These appointments were recorded in a signed Minute of Board Action, dated December 22, 2011. (JA 404; JA 300.) The Board also issued Hooks a Certificate of Appointment bearing the same date. (JA 404; JA 270.) The Board publicly announced Hooks's appointment on January 6, 2012. (JA 185.)

When Member Becker's term ended on January 3, 2012, the Board was reduced to two of five members. (*See* JA 178.) The following day, President Obama made three recess appointments to the Board. News Release, NLRB Office of Public Affairs, *White House Announces Recess Appointments of Three To Fill Board Vacancies* (Jan. 4, 2012), https://www.nlrb.gov/news-outreach/news-story/white-house-announces-recess-appointments-three-fill-board-vacancies (last visited Feb. 8, 2016). Those appointments were subsequently invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), issued on June 26, 2014.

On July 30, 2013, more than 10 months before the decision in *Noel Canning*, the Board regained a full contingent of Senate-confirmed Board members, all of whom were sworn in by August 12, 2013. *See* 159 Cong. Rec. S6049-51 (daily ed. July 30, 2013); News Release, NLRB Office of Public Affairs, *The NLRB Has*

Five Senate Confirmed Members (Aug. 12, 2013), http://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-has-five-senate-confirmed-members (last visited Feb. 8, 2016).

B. The Union's Information Requests

The Hospital operates a facility in Springfield, Oregon, which provides both in-patient and out-patient care. (JA 399; JA 38.) The Union represents a large cross-section of the Hospital's service, technical and skilled-maintenance employees. (JA 400; JA 33.) The parties' most recent collective-bargaining agreement ran from May 11, 2011, through December 31, 2013. (JA 400; JA 90.)

On November 4, 2013, ahead of the expiration of their collective-bargaining agreement, the parties began the process of bargaining for a successor agreement. (JA 400, 401; JA 38.) In the course of these negotiations, both parties submitted proposals for wage increases and the Hospital proposed making changes to the employees' healthcare plan. (JA 401; JA 36-37.)

On October 17, 2013, the Union conveyed a written request for the Hospital to provide certain information relevant to the negotiations by November 1, ahead of the parties' first bargaining session. (JA 401-02; JA 142-45.) The Hospital did not produce any information by November 1. (JA 402; JA 48.) The Hospital furnished some information at the first bargaining session on November 4 and

promised to deliver the rest by the end of the week, but failed to do so. (JA 402; JA 38-39, 41-42, 49-51, 146-47.)

After the Union reiterated its request on December 2, the Hospital provided some more information at the parties' second bargaining session on December 11. (JA 402-03; JA 51-53, 56-57, 148.) The Hospital supplied additional materials on December 18, and again on January 15, 2014, when it produced, among other things, job descriptions for unit employees. (JA 403; JA 57-62, 150-73, 174.) However, despite repeated assurances, the Hospital failed to provide information responsive to several items on the Union's request. (JA 402-03; JA 59-61, 63-65.) At no time during the discussions ensuing the Union's request did the Hospital contest the relevance of information sought by the Union. (JA 39, 42, 65.)

II. PROCEDURAL HISTORY

A. Unfair-Labor-Practice Charge and Complaint

In December 2013, the Union filed an unfair-labor-practice charge against the Hospital, followed by an amended charge in February 2014. (JA 69-70.) After an investigation, Regional Director Hooks issued a complaint and notice of hearing alleging that the Hospital violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by unreasonably delaying or failing to provide information requested by the Union that was necessary and relevant to the performance of its duties as collective-bargaining representative. (JA 397, 399; JA 71-82.) The

Hospital filed an answer to the complaint on April 14, 2014 (JA 83-89), and a hearing was scheduled before Administrative Law Judge Dickie Montemayor on July 8, 2014 (JA 399).

B. Administrative Hearing

Around 9:00 p.m. on July 7, 2014, the night before the hearing, the Hospital filed an amended answer raising, for the first time, the issue of Hooks's appointment and transfer to Region 19. (JA 5-8, 10, 15, 19, 267-68.) Specifically, the Hospital argued as an affirmative defense that the underlying complaint was void *ab initio* because Hooks's appointment to Region 19 and transfer from Memphis to Seattle both occurred when the Board lacked a valid quorum. (JA 397, 404; JA 5-6, 15-16.) The following morning, the judge granted a request by Counsel for the General Counsel ("the General Counsel") to address this issue in post-hearing briefing in light of how late it was raised. (JA 19, 26.)

At the hearing, the Hospital's attorney informed the judge that he would not participate in the proceedings except to offer evidence relating to the Hospital's affirmative defense. (JA 397; JA 16, 22.) Of particular relevance here, the Hospital presented a copy of the Board's news release announcing Hooks's appointment—procured from the Board's website and dated January 6, 2012—and the Board's reply brief in *Hooks v. Kitsap Tenant Support Services, Inc.* ("*Kitsap*"), No. 13-35912 (9th Cir.), an unrelated Ninth Circuit case. (JA 397 n.3;

JA 24, 185, 186-218.) In that brief, the Board erroneously asserted that Hooks had been appointed in January 2012. (JA 213 n.9.) The Hospital did not cross-examine the General Counsel's witnesses or present any witness or evidence regarding the merits of the case. (JA 397; JA 16, 22.)

On July 31, 2014, the Board filed a Motion to Correct Factual Misstatement and Lodge Supplemental Document ("Motion to Correct") in *Kitsap*. (JA 297-300.) In this motion, the Board requested permission to correct the error in its reply brief and to lodge with the Ninth Circuit a copy of the Minute of Board Action containing the proper date of Hooks's appointment.[2] (JA 298, 300.)

C. Post-Hearing Motions

Several motions were filed after the trial, each with their attendant responses and replies. First, the General Counsel moved to reopen the record and receive a copy of Hooks's Certificate of Appointment or, in the alternative, to take administrative notice of that document. (JA 267-68, 270.) The General Counsel explained that, "[d]ue to the lateness of the defense raised [by the Hospital], the appropriate documentation was not available for production in order to resolve the

[2] On August 6, 2014, the Ninth Circuit granted the Board's motion. *See Kitsap*, Order Granting NLRB Mot., ECF No. 32 (Aug. 6, 2014). However, on August 8, the employer filed a motion to strike the reply brief and supporting documents, which was referred to the merits panel. *See id.*, Emp'r Mot. Strike, ECF No. 33 (Aug. 8, 2014); Order Referring Mot. to Merits Panel, ECF No. 35 (Aug. 11, 2014). The panel heard argument on July 7, 2015, but has yet to issue an opinion or a ruling on the employer's motion.

question as to the exact date of appointment." (JA 267.) The General Counsel also asked the judge to take administrative notice of the Hospital's First Amended Answer, which first raised the issue of Hooks's appointment and was filed late on the eve of the hearing. (JA 267-68.) In response, the Hospital asked the judge to deny the motion or to reopen the hearing and allow the Hospital to offer testimony and documents relating to Hooks's appointment and transfer to Region 19. (JA 271-90.) The Hospital attached to its response a copy of a decision to dismiss an unfair-labor-practice charge issued by Region 26 on February 24, 2012 and signed by Hooks as Regional Director. (JA 286-90.) The General Counsel filed a reply, which included a copy of the Board's Motion to Correct in *Kitsap*, which itself contained a copy of the December 22, 2011 Minute of Board Action. (JA 291, 297, 300.)

Subsequently, the Hospital moved to strike the Minute of Board Action from the General Counsel's earlier reply or, in the alternative, to reopen the record on the issue of Hooks's appointment. (JA 302-12.) The General Counsel opposed the Hospital's motion, and additionally moved to strike three exhibits to the Hospital's post-hearing brief, which consisted of orders signed by Hooks in Region 19 between January and February 2012. (JA 313-15.) The Hospital filed an opposition to the General Counsel's motion (JA 316-24), to which the General Counsel replied (Supp. JA 3-6).

D. Decision of the Administrative Law Judge and Exceptions

On November 4, 2014, the judge issued a recommended order finding that the Hospital violated the Act as alleged. (JA 399-407.) In so doing, the judge granted in part the General Counsel's motion to reopen the record, taking administrative notice that Hooks's appointment to Region 19 occurred on December 22, 2011, when the Board had a valid quorum. (JA 404.) "[A]fter careful consideration," the judge denied the parties' post-hearing motions in all other respects. (JA 399 n.1.) Finally, the judge rejected the Hospital's argument that the Board should be estopped from arguing that Hooks's appointment and transfer took place before the Board's loss of quorum. (JA 404).

The Hospital filed a number of exceptions to the judge's recommended order. (JA 397; JA 331-44.) Separately, the Hospital filed a motion requesting that, if its exceptions relating to Hooks's appointment were rejected, the Board reopen the record to admit evidence that the Hospital and the Union had reached a successor agreement after the close of the hearing. (JA 397; JA 325-30.) The Hospital argued that this evidence was probative of the question whether information requested by the Union was necessary and relevant to its representative role. (JA 397.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On February 24, 2015, the Board (Chairman Pearce, Members Miscimarra and McFerran) affirmed the judge's rulings and findings and adopted his recommended order. (JA 397.) The Board noted that it had a valid quorum on December 22, 2011, when it appointed Hooks, and found that the date when Hooks assumed his duties in Seattle had no bearing on the validity of his appointment or his actions as Regional Director of Region 19. (*Id.*) The Board also denied the Hospital's motion to reopen the record, finding that the information requested by the Union was presumptively relevant and that this presumption was unrebutted by the conclusion of a successor agreement. (JA 397-98.)

The Board's Order requires the Hospital to cease and desist from the unfair labor practices found and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (JA 398.) Affirmatively, the Board's Order requires the Hospital to furnish the requested information to the Union in a timely manner, to post paper copies of a remedial notice and distribute this notice electronically to employees, if the Hospital customarily communicates with them by such means, and to file a sworn certification attesting to its efforts to comply with the Order. (*Id.*)

SUMMARY OF ARGUMENT

The Hospital has waived any argument pertaining to the merits of this case, *i.e.*, whether substantial evidence supports the Board's finding that the Hospital violated the Act by failing to provide, or unduly delaying the provision of, information requested by the Union and relevant to its duties as collective-bargaining representative. The Hospital's entire argument turns instead on a vain attempt to challenge Regional Director Hooks's authority to issue the underlying complaint on grounds that the Board lacked a quorum when he was appointed to Region 19.

The Hospital's argument is untenable because the General Counsel produced conclusive evidence that the Board *had* a valid quorum at the time of Hooks's appointment. On December 22, 2011, members of the Board signed a Minute of Board Action recording their unanimous vote to appoint Hooks as Regional Director of Region 19. The Board also issued Hooks a Certificate of Appointment bearing the same date.

The Hospital does not dispute that the Board maintained a valid quorum until January 3, 2012. Instead, it clings to its position that Hooks was appointed on January 6, relying on two secondary-source documents—the public announcement of Hooks's appointment and the Board's admittedly erroneous statement in *Kitsap*—neither of which disproves the validity of the Board's action. The same is

true of the Hospital's repeated insinuations of improper conduct, which, though intended to cast doubt on the integrity of the Board's internal processes, fall well short of overcoming the presumption of regularity that applies to the Board's actions.

Unable to impeach the Board's official documents, the Hospital resorts to baseless attacks against the Board's discretionary evidentiary rulings. The Hospital's first argument—that the Board could not take administrative notice of the Minute of Board Action and Certificate of Appointment—fails because both documents are self-authenticating sources whose accuracy cannot reasonably be questioned under the Federal Rules of Evidence. The Hospital's second claim—that the Board abused its discretion by denying its requests to reopen the record—also fails because the Hospital cannot proffer evidence it could present to rebut the Board's documents, or how such evidence would compel a contrary result.

There is no merit to the Hospital's contention that, because the Board inadvertently stated in its reply brief in *Kitsap* that Hooks was appointed in January 2012, the Board is estopped from taking a contrary position in this proceeding. The Hospital has never alleged, must less shown, that it relied on the Board's mistake to its detriment. Moreover, the Hospital's claim that the Board relied on an alternate finding to conclude that Hooks was validly appointed is mistaken.

Finally, the Hospital either misunderstands or mischaracterizes Board procedure in claiming that Hooks was invalidly transferred to Region 19. As stated above, the Board appointed Hooks on December 22, 2011. The ensuing events, to which the Hospital refers as Hooks's "transfer," simply comprise the sum of actions, administrative and logistical, necessary to implement the Board's appointment. Thus, the actual date of Hooks's arrival in Seattle is irrelevant to the validity of his appointment and actions as Regional Director.

ARGUMENT

I. THE COURT SHOULD SUMMARILY AFFIRM THE BOARD'S FINDING THAT THE HOSPITAL UNLAWFULLY FAILED TO PROVIDE REQUESTED INFORMATION; THE HOSPITAL WAIVED ALL MERITS ARGUMENTS

Other than a cursory mention in the statement of issues (Br. 3 ¶¶ 8-10), the Hospital's opening brief neither addresses nor challenges the Board's finding that the Hospital violated Section 8(a)(5) and (1) of the Act by either failing to provide, or unduly delaying the provision of, information requested by the Union and relevant to the fulfillment of its duties as collective-bargaining representative. Accordingly, the Court should deem waived any challenge to the merits of the Board's Order. *See Fox v. Gov't of D.C.*, 794 F.3d 25, 29-30 (D.C. Cir. 2015) (holding that appellant forfeited challenge to dispositive issue by failing to argue it in opening brief); *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (per curiam) (same); Fed. R. App. P. 28(a)(8)(A) (argument section of a brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"). Therefore, so long as the Board acted within its discretion in rejecting the Hospital's challenge to Hooks's appointment, the Board is entitled to summary enforcement of its Order.

Assuming, *arguendo*, that the Hospital's failure to brief the merits of this case does not constitute waiver, the record amply supports the Board's finding that

the Hospital violated the Act as alleged. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5).[3] The duty to bargain entails an obligation for employers to "provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556 (D.C. Cir. 2012). Failure to provide a timely, legitimate basis for refusing to disclose relevant information is tantamount to bad-faith bargaining. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 150-51 (1956); *U.S. Postal Serv.*, 332 NLRB 635, 636 (2000).

The Board found, based on unrebutted evidence, that the Hospital failed to supply information responsive to several items in the Union's request. (JA 403; JA 59-61, 63-65.) The Board further found, based on similarly unrebutted testimony, that the Hospital did not produce basic and readily available information, such as job descriptions for unit employees, until January 2014, nearly three months after the Union's request and well into the parties' negotiations. (JA 403-04; JA 61-62,

[3] Section 7 of the Act grants employees "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing . . . ." 29 U.S.C. § 157. Section 8(a)(1), in turn, makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7." *Id.* § 158(a)(1). A violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 n.1 (D.C. Cir. 2011).

174.) Accordingly, the Board found, and substantial evidence supports, that the Hospital violated Section 8(a)(5) and (1) of the Act by either failing to provide, or unduly delaying the provision of, information relevant to the Union's fulfillment of its duties as collective-bargaining representative.

II. BASED ON CONCLUSIVE AGENCY DOCUMENTS, THE BOARD FOUND THAT HOOKS WAS APPOINTED ON DECEMBER 22, 2011; THE HOSPITAL'S CHALLENGES TO HOOKS'S AUTHORITY AND ITS ATTEMPTS TO PRECLUDE THE BOARD FROM RELYING ON THE CORRECT DATE OF HOOKS'S APPOINTMENT ARE UNFOUNDED IN EITHER LAW OR FACT

Before the judge, the General Counsel presented unassailable evidence, in the form of official Board documents, that Hooks was appointed to Region 19 on December 22, 2011, when the Board had a valid quorum. The Hospital asks the Court to ignore that conclusive proof and limit itself to the Hospital's secondary sources that it claims show a later appointment date. In support of its attempt to limit the evidence, the Hospital challenges the judge's rulings, which the Board affirmed, taking administrative notice of the date of Hooks's appointment and denying the Hospital's motion to reopen the record. This Court reviews evidentiary rulings for abuse of discretion. *See Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1273 & n.1 (D.C. Cir. 2012) ("When an ALJ's evidentiary ruling has been upheld by the Board, our review is deferential."). As shown below, the Board properly found that Hooks's appointment was valid and acted within its discretion in its evidentiary rulings and rejection of the Hospital's

attempt to limit the evidence to present a distorted picture of the appointment's timing.

A. The Board Had a Valid Quorum When It Appointed Hooks to Region 19

Ronald K. Hooks was first appointed Regional Director of the Board's Region 26 (Memphis) in 2000. There is no dispute that the Board had a quorum at the time of Hooks's first appointment. On December 22, 2011, a Board composed of Chairman Pearce and Members Hayes and Becker appointed Hooks Regional Director of Region 19 (Seattle). This appointment is documented in a Minute of Board Action and Hooks's Certificate of Appointment, both dated December 22, 2011. It is also undisputed that the Board did not lose its quorum until January 3, 2012, over a week later.[4]

According to the Hospital (Br. 23-24), the judge should have ignored this irrefutable evidence of Hooks's appointment and instead decided this case solely on the record at the hearing's close, even though it consisted only of secondary-source documents misstating the actual facts. Setting aside that the Hospital offers no case law to support this argument, the Hospital also ignores its own role in this situation. Indeed, the Hospital could have raised the Hooks-appointment defense in its first answer to the complaint, filed on April 14, 2014.[5] Had it done so, and

[4] (*See* JA 178.)

[5] Before the judge, counsel for the Hospital asserted that he was delayed by the need to analyze the Supreme Court's *Noel Canning* decision, which issued 12 days

given the General Counsel earlier notice of its intent to rely on this defense, the aforementioned documents could have been gathered in time for the hearing, rather than having to move separately for their admission.[6] Instead, the Hospital waited until the eleventh hour to raise the issue and now argues that the case should have been judged on an incomplete record.

In any event, the Hospital offers no basis to dispute the validity of Hooks's appointment, or to refute the accuracy of the Board's official documents. First, to the extent that the Hospital attempts to raise doubts about Hooks's appointment (Br. 34), the secondary-source documents on which it relies do not refute the Board's finding. The January 6, 2012 date on the announcement of Hooks's appointment refers to the day the announcement was issued, not the date of the

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before the hearing. (JA 273 n.1.) However, as the Hospital points out in its opening brief (Br. 27-28), the employer in *Kitsap* raised exactly the same defense a year earlier, when it opposed Hooks's petition for preliminary injunctive relief. *See Hooks v. Kitsap Tenant Support Servs., Inc.*, No. 13-CV-5470-BHS, Resp't Mot. Dismiss, Dkt. No. 12, at 21-22 (W.D. Wash. July 18, 2013) (arguing Hooks lacked authority to issue complaint because Board had no valid quorum when he was appointed). Moreover, the Board's reply brief in *Kitsap* was filed on March 7, 2014, over a month before the Hospital filed its first answer in this case.

[6] It is worth noting that the Hospital filed its amended answer at 9:02 p.m., just 12 hours before the hearing the next morning. (JA 10.) The hearing lasted less than 90 minutes. (JA 67.) Thus, the Hospital virtually guaranteed that no responsive document could be found and offered into evidence before the record was closed. Moreover, Counsel for the General Counsel had no basis upon which to seek a continuance because she did not know at the time whether any responsive documents existed, and because the judge had given the parties permission to address the issue at greater length in their post-hearing briefs.

appointment.[7] As to the reply brief in *Kitsap*, the Board moved to correct its inadvertent misstatement and provided the Ninth Circuit with a copy of the Minute of Board Action. Therefore, neither document offers any basis to impeach the validity of Hooks's appointment.

The Hospital is also unable to proffer any basis to refute the accuracy or authenticity of the Board's official documents establishing that Hooks was appointed on December 22. Instead, the Hospital engages in a not-so-veiled attempt to impugn the integrity of the Board's internal processes. (*See, e.g.*, Br. 18, 20, 26 & n.7, 30-31.) To the extent the Hospital suggests that the Board acted improperly or in bad faith, it cannot overcome the presumption of regularity befitting the actions of Board members.

"The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (listing cases); *see also Am. Fed'n of Gov't Emps., AFL-CIO v. Reagan*, 870 F.2d 723, 727 n.33 (D.C. Cir. 1989) (listing cases). A party alleging improper conduct by an agency or its officers bears a heavy burden, as the

[7] The wording of the announcement confirms this fact, stating that the Board "*today announced* the appointment of Ronald K. Hooks as Regional Director in the Seattle Regional Office . . . ." (JA 185 (emphasis added).)

presumption may be overcome "only upon a strong showing of bad faith or improper behavior." *Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978).

In this case, the Hospital has not produced any evidence of bad faith or improper behavior that rebuts the presumption of regularity. Instead, it resorts to bare insinuations, which are clearly insufficient to carry its burden.[8] For instance, the Hospital questions the reliability of the Minute of Board Action because it was signed "For Brian Hayes" by James R. Murphy, Member Hayes's Chief Counsel.[9] (Br. 26 n.7.) The Hospital did not raise an exception to the Board on this basis and therefore Section 10(e) of the Act bars the Court from considering this claim. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *see also HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015) (finding argument not raised to the Board barred by Section 10(e)). In any event, the Hospital offers no basis, legal or otherwise, to doubt that Member Hayes agreed to

[8] *See, e.g.*, Br. 18, 20, 30-31.

[9] Murphy was Member Hayes's Chief Counsel at the time of this case. *See* Announcement, NLRB Office of Public Affairs, *James Murphy Named Chief Counsel for Board Member Brian Hayes* (Sept. 30, 2010), http://apps.nlrb.gov/link/document.aspx/09031d45803afc70 (document will download) (last visited Feb. 8, 2016); *id.*, *NLRB Members Select Chief Counsels* (Aug. 26, 2013), https://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-members-select-chief-counsels (last visited Feb. 8, 2016).

the appointment of Hooks or that Murphy's signature was anything other than a ministerial act in Member Hayes's absence.[10]

Ultimately, the Hospital's quarrel boils down to its objection to two discretionary evidentiary rulings of the Board, one taking administrative notice of the date of Hooks's appointment based on official Board documents, and the other declining to reopen the record for the Hospital to pursue unspecified evidence that might support its position. As shown below, both rulings are justified and entirely within the Board's discretion. The Hospital's dissatisfaction with these discretionary decisions is not enough alone to rebut the presumption of regularity. *See La. Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1119 (D.C. Cir. 1992) ("[E]vidence [to rebut presumption] must be far more compelling than a pattern of adverse but nonetheless justified discretionary decisions.").

[10] *See, e.g.*, *United States v. Doe*, 871 F.2d 1248, 1257 (5th Cir. 1989) (Assistant U.S. Attorney's signing of motion on U.S. Attorney's behalf did not void document where decision to file motion was made by an authorized person); *Bd. v. Comm'r*, 51 F.2d 73, 76 (6th Cir. 1931) ("The record is wholly devoid of evidence . . . that the waiver was not executed by the Commissioner himself or by one duly authorized to act in that behalf. The execution of the waiver by the Commissioner is a purely ministerial act, and it is not clear why signature by a duly authorized deputy is not sufficient.").

B. The Board Did Not Abuse Its Discretion in Taking Administrative Notice that Hooks Was Appointed on December 22, 2011

The Board acted well within its discretion in taking administrative notice of the fact that Hooks was appointed on December 22, 2011. (JA 397, 404.) To the extent the Hospital attacks the documentary foundation for that finding (Br. 24-27), its argument fails because the Board can take administrative notice of its own proceedings. (JA 404 (citing *Metro Demolition*, 348 NLRB 272 (2006)).)

Moreover, the Minute of Board Action and Certificate of Appointment are both self-authenticating public documents whose accuracy cannot reasonably be questioned. The Board conducts its proceedings in accordance with the Federal Rules of Evidence "so far as is practicable." 29 C.F.R. § 102.39; *see also HealthBridge Mgmt.*, 798 F.3d at 1083 n.7. Under the Rules, judicial notice may be taken of facts that are "not subject to reasonable dispute because [they] . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Moreover, documents bearing "a seal purporting to be that of . . . a department, agency, or officer" of the United States, as well as "a signature purporting to be an execution or attestation," are self-authenticating, *i.e.*, "they require no extrinsic evidence of authenticity in order to be admitted." Fed. R. Evid. 902(1).

The Minute of Board Action and Certificate of Appointment satisfy both Rule 902(1) self-authenticating criteria and, as such, they are sources whose

accuracy cannot reasonably be questioned under Rule 201(b)(2).[11] As discussed above, pp. 20-21, the secondary-source documents relied upon by the Hospital do not cast doubt upon the facts established by the Board's official documents. Therefore, there can be no reasonable dispute that Hooks was appointed on December 22, 2011, and the Board did not abuse its discretion in taking administrative notice of that fact.

C. The Board Acted Within Its Discretion in Denying the Hospital's Requests to Pursue and Present Evidence on Hooks's Appointment

After the General Counsel moved for the judge to reopen the record or take administrative notice of Hooks's Certificate of Appointment, the Hospital sought to reopen the hearing so that it could offer further "evidence . . . that Mr. Hooks' appointment occurred during the no-quorum period." (JA 279, 279-81; *see also* JA 307-09, 420 n.8.) The Board denied this request. (JA 397, 399 n.1.) This Court "will not find an abuse of discretion [in the denial of a motion to reopen the record] unless it 'clearly appear[s] that the new evidence would compel or persuade to a

[11] The cases on which the Hospital relies for this point (Br. 26-27) are inapposite because none of them involves taking judicial notice of facts that could be accurately and readily determined from self-authenticating documents. *See, e.g.*, *Am. Stores Co. v. Comm'r*, 170 F.3d 1267, 1270 (10th Cir. 1999) (unpublished IRS rulings issued to private taxpayers, which the Internal Revenue Code prohibits using or citing as precedent); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1354-55 (7th Cir. 1995) (federal filing in which defendant attested to the number of its employees); *United States v. Bonds*, 12 F.3d 540, 552-53 (6th Cir. 1993) (report by private institution examining the FBI's method of declaring DNA matches).

contrary result.'" *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999) (second brackets in original) (quoting *Cooley v. FERC*, 843 F.2d 1464, 1473 (D.C. Cir. 1988). The challenged ruling also must have resulted in demonstrated prejudice. *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996) (party challenging Board's evidentiary rulings must show prejudice resulted from inability to present evidence).

The Board clearly acted within its discretion in denying the Hospital's request. The General Counsel provided the judge with official Board documents demonstrating that Hooks was appointed on December 22, 2011. In response, the Hospital did not make *any* proffer, whether before the judge or the Board, of what evidence it might present or even seek, or how such evidence would contradict the Board's official documents.[12] Instead, the Hospital argued only that it should be given a chance to conduct a search for "relevant documents" by way of depositions and subpoenaed testimony, and to "question . . . agency officials with relevant knowledge of Mr. Hooks' appointment and transfer." (JA 280; *see also* JA 308.)

[12] The cases on which the Hospital relies (Br. 31) are easily distinguished because, in those cases, courts found that the Board had erred in denying subpoenas, which described with particularity the nature of the requested evidence. *See Ozark Auto. Distribs., Inc. v. NLRB*, 779 F.3d 576, 586-88 (D.C. Cir. 2015) (records of telephone calls and other communications between union and employees); *Ind. Hosp., Inc. v. NLRB*, 10 F.3d 151, 152 (3rd Cir. 1993) (records pertaining to information officers in Region 6 and testimony of regional director); *Drukker Commc'ns, Inc. v. NLRB*, 700 F.2d 727, 730 (D.C. Cir. 1983) (testimony of a specific Board employee). Here, by contrast, the Hospital's motion essentially amounted to a request to launch a proverbial "fishing expedition."

Likewise, before this Court, the Hospital again fails to explain what evidence it could or would have sought if the judge had granted its request to reopen, let alone how such evidence would have compelled a different result. Such vague claims fail to demonstrate prejudice from the Board's ruling. In sum, the Hospital has not met its burden before this Court. *See Midwest Television, Inc. v. FCC*, 426 F.2d 1222, 1229 (D.C. Cir. 1970) (upholding denial of motion to reopen where petitioner "did not challenge the substance of the matters officially noticed or give any indication of what matters it might bring forward in the way of rebuttal."); *see also Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1166 (D.C. Cir. 2004) (affirming Board ruling where employer failed to demonstrate prejudice from judge's exclusion of evidence).[13]

The Hospital's reliance (Br. 31-32) on Section 556 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 500, et seq., does not alter this conclusion. First, the Hospital did not raise the APA in its exceptions to the Board, so the Court is jurisdictionally barred from hearing this argument now. *See* 29 U.S.C. § 160(e); *HealthBridge Mgmt.*, 798 F.3d at 1069. In any event, the APA allows

[13] *Cf. Colon Ortiz v. Rosario*, 132 F. App'x 847, 848 (1st Cir. 2005) (per curiam) (upholding denial of motion to reopen discovery where movant failed to indicate how reopening would lead to evidence that might alter the result); *NLRB v. Milco Undergarment Co.*, 212 F.2d 801, 802 (3d Cir. 1954) (per curiam) (holding that respondents' failure to make an offer of proof, disclosing the nature of the evidence they wished to introduce, precluded finding that they were prejudiced by the Board's denial of their motion to reopen).

agencies to take administrative notice of facts not in the record and draw reasonable conclusions therefrom, including in adjudicatory proceedings. *See* 5 U.S.C. § 556(e); *Midwest Television*, 426 F.2d at 1229. Section 556(e) also provides that, when official notice is taken, a party is entitled to "an opportunity to show the contrary." However, the burden remains with that party to rebut the facts officially noticed or explain what matters it could raise in rebuttal. *Midwest Television*, 426 F.2d at 1230. The Hospital's failure to do so here "excused the [Board] from granting its petition to reopen." *Id.* (footnote omitted) (citing *Market Street Ry. Co. v. R.R. Comm'n*, 324 U.S. 548, 561-62 (1945)).

Finally, it bears repeating that, because of the *Kitsap* litigation, the Hospital knew all along it could challenge Hooks's appointment in these proceedings, and thus had ample opportunity to seek primary-source documents on this matter before the hearing commenced. Instead, the Hospital waited until the last minute to raise the issue and only sought to reopen the record when presented with official documents refuting its defense. Given these circumstances, it was hardly an abuse of discretion for the Board to deny the Hospital's request.

D. The Hospital Cannot Prevail on Its Estoppel Claim Because It Failed To Show that It Relied to Its Detriment on the Board's Mistake in *Kitsap*

The Hospital cannot prevail on its estoppel claim because it has failed to establish the basic requirements of the equitable-estoppel doctrine. A party claiming estoppel must show that it reasonably relied on its adversary's conduct

"in such a manner as to change his position for the worse." *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 59 (1984) (quoting 3 J. Pomeroy, *Equity Juris.* § 805, at 192 (S. Symons ed. 1941)).[14] Moreover, parties invoking estoppel against the Government face a greater burden than against other litigants. *See generally id.* at 60-61. This higher standard exists because, "[w]hen the Government is unable to enforce the law . . . , the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Id.* at 60.

In this Court, a "party attempting to apply equitable estoppel against the government must show that '(1) there was a definite representation to the party claiming estoppel, (2) the party relied on its adversary's conduct in such a manner as to change his position for the worse, (3) the party's reliance was reasonable[,] and (4) the government engaged in affirmative misconduct.'" *Keating v. FERC*, 569 F.3d 427, 434 (D.C. Cir. 2009) (brackets in original) (quoting *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 191 (D.C. Cir. 2009)); *see also Pierce v. SEC*, 786 F.3d 1027, 1038 (D.C. Cir. 2015) ("Estoppel generally requires that government agents engage—by commission or omission—in conduct that can be characterized as misrepresentation or concealment, or, at least, behave in ways that

[14] The Hospital's attempt to distinguish *Heckler* based on its facts (Br. 28) is misguided because the judge relied on *Heckler* only for its overarching legal principles. (*See* JA 404 (quoting *Heckler*, 467 U.S. at 60-61).) The Hospital does not dispute that these principles apply here with equal strength.

have or will cause an egregiously unfair result."). The Hospital did not make any such showing.

The Board's inadvertent misstatement was not made to the Hospital, but in a brief in *Kitsap*, an entirely different matter involving a different employer and before a different court. Upon realizing its mistake the Board immediately notified the Ninth Circuit and moved to correct the brief. As for the announcement of Hooks's appointment, it was disseminated to the general public by the Board's Office of Public Affairs, not communicated specifically to the Hospital. Moreover, although a reader could assume that the January 6th announcement was made on the same day as the appointment and be left with that misimpression (JA 404), its language indicated no such thing. *See* note 7, *supra*.

More importantly, and as the Board explained (JA 404), the Hospital has made no showing that it relied on the inaccuracies in the *Kitsap* brief (or the announcement of Hooks's appointment) and changed its position for the worse as a result. *See Lyng v. Payne*, 476 U.S. 926, 935 (1986) (noting that failure to demonstrate reliance on adverse party's misrepresentations precludes one from prevailing on an equitable-estoppel theory). Furthermore, the Hospital has not alleged, and certainly not shown, that the Board's misstatement in *Kitsap* amounted to active misrepresentation or concealment. *See Pierce*, 786 F.3d at 1038 (equitable-estoppel claim fails without showing of affirmative misconduct).

Finally, even if the Hospital could show that it reasonably relied on the *Kitsap* brief in devising its legal strategy before the judge, once evidence emerged that the Board validly appointed Hooks, the Hospital could have sought to mitigate the damage to its position by filing, before the judge or the Board, a motion to reopen the record in order to present a full defense on the merits. However, the Hospital's only request to reopen the record on the merits was to offer the parties' new collective-bargaining agreement, which was signed after the events of this case. The Hospital never attempted to present any contemporaneous evidence to rebut the information-request violations.

E. The Hospital's Remaining Arguments Are Equally Unavailing

1. The Board did not need to address the judge's mootness finding because the official Board documents conclusively establish that Hooks was appointed before the Board's loss of quorum

The Hospital errs in claiming (Br. 34-35) that the Board relied on a July 18, 2014 Minute of Board Action ("the July 18 Minute") to find that Hooks was validly appointed and transferred to Region 19. In that Minute, the full five-member Board ratified *nunc pro tunc* and expressly authorized the selection of regional directors appointed by the recess Board. *See* Supp. JA 1-2; News Release, NLRB Office of Public Affairs, *NLRB Officials Ratify Agency Actions Taken During Period When Supreme Court Held Board Members Were Not Validly Appointed* (Aug. 4, 2014), https://www.nlrb.gov/news-outreach/news-story/nlrb-

officials-ratify-agency-actions-taken-during-period-when-supreme-court (last visited Feb. 8, 2016). The judge made an *alternative* finding that, even assuming the Hospital was correct about the timing of Hooks's appointment, that defense was mooted because the July 18 Minute ratified all administrative and personnel actions taken by the invalid Board. (JA 405.) While the Board adopted the judge's findings (JA 397), it did not mention the alternative finding related to the July 18 Minute, for obvious reasons: because the Board undeniably appointed Hooks before losing its quorum, there was no reason to explicitly ratify Hooks's appointment or transfer after the Board regained a quorum in 2014.[15] For the same reasons, the Hospital's argument (Br. 34-35) regarding the extent to which the July 18 Minute may validate actions taken by Hooks prior to that date is also immaterial.

2. Hooks's appointment became effective on December 22, 2011; therefore, the timing of his arrival in Region 19 is immaterial

Unable to challenge the official Board documents evidencing Hooks's appointment, the Hospital instead argues that he was invalidly transferred to Region 19 after the Board's loss of quorum. (Br. 32-33.) However, the Hospital's

[15] For this reason, and contrary to the Hospital's assertion (Br. 34), the fact that the Board did not mention the July 18 Minute in affirming the judge's recommended order is entirely consistent with the Board's position in *SSC Mystic*. *See SSC Mystic Operating Co., LLC v. NLRB*, No. 14-1045, NLRB Br., 2014 WL 7406703, at *38 n.17 (D.C. Cir. Dec. 31, 2014) (explaining that there is no reason to ratify the appointment of another regional director who, like Hooks, was appointed while the Board had a valid quorum).

argument rests on a false dichotomy between the Board's act of appointing Hooks and the ensuing administrative steps required to implement that appointment.

As an initial matter, and contrary to the Hospital's characterization (Br. 18), Section 4(a) of the Act gives the Board authority to appoint regional directors, but does not mention transfers. *See* 29 U.S.C. § 154(a). Furthermore, "[f]or more than [200] years, the rule as to when an appointment takes place has been clear: 'when the last act to be done by the [appointing authority] was performed.'" *NTEU v. Reagan*, 663 F.2d 239, 242 (D.C. Cir. 1981) (third brackets in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803)). Here, the appointing authority (the Board) took the last step to appoint Hooks on December 22, 2011. The administrative actions that followed, however necessary to implement the appointment, simply proceeded from this "last act" of the Board. This includes actions taken by Hooks to complete business in Region 26 before relocating to Seattle, such as issuing decisions and dismissal orders in various cases. (*See* Br. 14, 32-33; JA 427-48.) These types of actions are hardly uncommon in the context of an outgoing manager seeking to wrap up outstanding matters as much as possible.

The Hospital would have this Court grant review simply because the Board did not spell out why Hooks's transfer to Region 19 was not completed by the time the Board lost its quorum. Yet it is a matter of common sense, which should not

require additional explanation, that the Board cannot fully implement personnel transfers at the stroke of a pen. Indeed, the administrative practicalities inherent in any appointment were compounded, in this case, with the logistics of relocating Hooks from Memphis to Seattle. In any event, the Board's failure to detail the intricacies of Hooks's transfer does not detract from its finding (JA 397) that it is immaterial when Hooks assumed his duties or physically arrived in Region 19. *See Marbury*, 5 U.S. at 157.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Hospital's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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February 2016

STATUTORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

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THE NATIONAL LABOR RELATIONS ACT

Section 4 of the Act (29 U.S.C. § 154) provides in relevant part:

(a) Each member of the Board and the General Counsel of the Board shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No administrative law judge's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no administrative law judge shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act [subchapter] shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) . . . .

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) . . . .

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its

original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

THE BOARD'S RULES AND REGULATIONS

29 C.F.R. § 102.39 *Rules of evidence controlling so far as practicable.*

Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934, (title 28 U.S.C., secs. 723–B, 723–C).

THE ADMINISTRATIVE PROCEDURE ACT

Section 556 of the APA (5 U.S.C. § 556) provides in relevant part:

Sec. 556. *Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision*

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

THE FEDERAL RULES OF EVIDENCE

Rule 201 provides in relevant part:

Rule 201. *Judicial Notice of Adjudicative Facts*

(b) *Kinds of Facts That May Be Judicially Noticed*. The court may judicially notice a fact that is not subject to reasonable dispute because it:

> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Rule 902 provides in relevant part:

Rule 902. *Evidence That Is Self-Authenticating*

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

> (1) *Domestic Public Documents That Are Sealed and Signed*. A document that bears:
>
> > (A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and
> >
> > (B) a signature purporting to be an execution or attestation.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MCKENZIE-WILLAMETTE REGIONAL MEDICAL CENTER ASSOCIATES, LLC, doing business as MCKENZIE-WILLAMETTE MEDICAL CENTER	)	
Petitioner/Cross-Respondent	)	No. 15-1125 15-1171
v.	)	Board Case No. 19-CA-119098
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 8,046 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2010. The Board further certifies that the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel, and that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.2015.2015 and is virus-free according to that program.

s/ Linda Dreeben
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Dated at Washington, DC
this 8th day of February 2016

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MCKENZIE-WILLAMETTE REGIONAL MEDICAL CENTER ASSOCIATES, LLC, doing business as MCKENZIE-WILLAMETTE MEDICAL CENTER Petitioner/Cross-Respondent	)	No. 15-1125 15-1171
v.	)	Board Case No. 19-CA-119098
NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2016, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC
this 8th day of February 2016